BEST AVAILABLE COPY

NO. 06-11543

IN THE SUPREME COURT OF THE UNITED STATES

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF TO UNITED STATES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
By: Margaret A. Katze
Attorney for Petitioner

SERVICE TO:
Solicitor General
Department of Justice
Washington, D.C. 20530

Assistant United States Attorney David N. Williams
P.O. Drawer 607
Albuquerque, NM 87103

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Pursuant to Supreme Court Rule 15(6), petitioner Larry Begay submits the following reply brief in response to the government's brief in opposition to his petition for a writ of certiorari.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case presents an important question of federal law that has not been, but should be, settled by this Court: is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act.

A. *Introduction*

The government fails to supply convincing reasons for this Court to deny certiorari in this case. That the Tenth Circuit remanded the case to the district court on a ground different from the ground Mr. Begay raises in his petition does not argue against this court addressing the Armed Career Criminal Act ("ACCA") issue the Tenth Circuit squarely addressed and ruled upon against Mr. Begay. With respect to the merits of Mr. Begay's contention that driving while intoxicated ("DWI") is not a "violent felony" under the ACCA, the government disregards the substance of Mr. Begay's cogent argument and the problematic implications of its own interpretation of the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). This court should grant certiorari in this case to continue its exploration of the meaning of that clause in a context very different from the context this Court considered in *James v. United States*, 127 S.Ct. 1586 (2007).

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B. ***That the Tenth Circuit remanded this case to the district court on a ground different from the ground Mr. Begay raises in his petition does not argue against granting certiorari.***

That the Tenth Circuit remanded this case to the district court on a ground different from the ground Mr. Begay raises in his petition for certiorari is not an obstacle to this Court's granting of certiorari, as the government claims, (United States' Brief in Opposition ("BIO") 8-9). The Tenth Circuit held that the district court must resentence Mr. Begay because the district court had misunderstood its discretion to sentence between the bottom of the guideline range of 188 months and the ACCA mandatory minimum of 180 months. (App. A at 23-27). The Tenth Circuit upheld the district court's determination that Mr. Begay s three felony DWIs were "violent felonies" under the ACCA and, consequently, that the ACCA mandatory minimum applied. (App. A at 5-22; App. A, Con.). Mr. Begay challenges the latter final decision in his certiorari petition. The remand the Tenth Circuit ordered has no bearing on the ACCA issue Mr. Begay raises here. That issue is squarely before this court. This court's ruling on that issue will have a profound impact on Mr. Begay's resentencing. That issue is ripe for review.

This court has jurisdiction to review non-final judgments. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 350-351 (1976); 28 U.S.C. § 1254(1)(cases in the Court of Appeals may be reviewed by the Supreme Court by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"). This court reviews such judgments very often, including where resolution of the issue raised "is fundamental to the further conduct of the case." *Larson*

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v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685, n. 3 (1949); *Land v. Dollar*, 330 U.S. 733, 734 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). This court's ruling in Mr. Begay's favor would fundamentally change Mr. Begay's sentence. Instead of facing a guideline range of 188 months to 235 months, (App. A at 3), and a mandatory minimum of 15 years, 18 U.S.C. § 924(e), he would face a guideline range of 41 to 51 months, (Petition for Certiorari ("PFC") at 1), with no applicable mandatory minimum and a maximum sentence of ten years, 18 U.S.C. § 924(a)(2). Mr. Begay raises a question the determination of which is critical to his resentencing.

This Court also grants certiorari when the reasons for certiorari override any finality concerns. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-409 (1915)(lower courts differed on fundamental question); *Forsyth v. City of Hammond*, 166 U.S. 506, 515 (1897) ("unfortunate possibilities of conflict and collision" arising from adverse lower court decisions). Indeed, this court has granted review in many cases, including sentencing cases, where a circuit court of appeals has disposed of an appeal by remanding for further proceedings. *See*, e.g., *Gall v. United States*, 127 S.Ct. 2933 (2007)(granting certiorari to review *United States v. Gall*, 446 F.3d 884, 889-890 (8th Cir. 2006)(reversing sentence and remanding for resentencing)); *Scott v. Harris*, 127 S.Ct. 1769, 1773-1774 (2007)(reviewing Eleventh Circuit's decision affirming denial of civil rights defendant's summary judgment and remanding for trial); *United States v. Booker*, 543 U.S. 220, 228 (2005)(reviewing Seventh Circuit's reversal of sentence and remand to sentence within unenhanced guideline range or to hold separate sentencing hearing before jury); *Estelle v. Gamble* 429 U.S. 97, 98 (1976)(over

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dissent, *id.* at 115 (Stevens, J., dissenting), reviewing Fifth Circuit's reversal and remand with instructions to reinstate civil rights complaint); 17 CHARLES ALAN WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE § 4036, n. 74 (2007)(listing cases).

In short, "[r]eview is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not." 17 WRIGHT § 4036 & nn. 74 & 75. In this case, where compelling reasons support the granting of certiorari, the fact that the Tenth Circuit remanded for resentencing on grounds that have no effect on the issue which Mr. Begay raises and which the Tenth Circuit squarely addressed should not stand in the way of granting certiorari.

C. *This Court's decision in James does not conflict with Mr. Begay's position.*

To counter Mr. Begay's position, the government misapplies parts of this Court's discussion in *James*. Contrary to the government's claim, (BIO at 10-12), this Court's rejection of the *ejusdem generis* argument in *James* has no bearing on Mr. Begay's *ejusdem generis* argument in this case. This Court held in *James* that the "otherwise" clause is not limited to completed offenses, as the defendant claimed all the listed offenses were, but also includes attempts. *Id.*, 127 S.Ct. at 1592-1593. This Court first pointed out the enumerated offenses included offenses that were not completed, thus undermining the defendant's underlying premise. *Id.* at 1592. This Court then pointed out that the most relevant common attribute is not the completed nature of the listed offenses, but rather that all of those offenses "create significant risks of bodily injury or confrontation that might result in bodily injury."

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Id. In so stating, this Court made no inference, as the government asserts, (BIO at 11-12), that a relevant common attribute was not, as Mr. Begay contends, active violence.

This Court went on to explain that Congress "did not intend the ... enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others ...." *Id.* at 1593. Again, this statement does not carry the import the government wishes it to, (BIO at 10-11. The notion that the enumerated offenses are not an exhaustive list is completely consistent with Mr. Begay's position. If it were an exhaustive list, there would be no need for a residual clause. This Court's reference to "types" of crimes refers to the question before this Court at the time—the completed nature of the offenses—, rather than to any other aspect of the enumerated offenses not before this Court.

The government's attempt to interpret that reference more broadly to support its notion that the enumerated offenses are merely examples of offenses that "present[] a serious potential risk of physical injury to another," (BIO 11, 12), is thwarted by this Court's subsequent discussion in *James*. This Court used the enumerated offenses as a "baseline" from which to measure whether the "otherwise" clause covered attempted burglary , as defined in Florida. *Id.* at 1594. Thus, this Court recognized the listed offenses play a more significant role than the government accords to them. The enumerated offenses illuminate the meaning of the residual clause. This Court in *James* certainly did not say, as the government contends it did, (BIO at 10-12), that any felony that "presents a serious risk of physical injury to another" is a "violent felony," whether or not it is an active, violent felony.

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As Justice Scalia pointed out in his dissent in *James*, *id.* at 1601, this Court failed to address, or provide a methodology to address, how the residual clause applies to offenses, such as DWI, that are not closely analogous to the enumerated offenses. This case presents an opportunity for this Court to undertake that task. Since *James* did not affect the issue Mr. Begay presents in this case, no further percolation of the issue in the lower courts in light of *James* is necessary, contrary to the government's position, (BIO 15-16). This court should grant certiorari now to address the question whether DWI is a "violent felony" under the ACCA.

D. *Leocal and Doe strongly support Mr. Begay's position.*

The government misunderstands the reasons why *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *United States v. Doe*, 960 F.3d 221 (1st Cir. 1992), support Mr. Begay's position. Of course, as the government points out, (BIO at 13-16), the holdings in *Leocal* and *Doe* are not in direct conflict with the Tenth Circuit's holding in this case. But, the analysis in *Doe*, 960 F.2d at 225, and this Court's quotation of that analysis in *Leocal*, 543 U.S. at 11, strongly support the persuasive force of the word the residual clause defines—"violent felony." That word "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than drunk driving does. *Doe*, 960 F.2d at 225. The residual clause must be read in light of that term. *Id.*

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E. ***The government's interpretation of the residual clause contradicts the language, and legislative history of the residual clause and the purpose of the ACCA.***

The government disregards the problematic features of its interpretation of the "otherwise" clause. Its notion that Congress enumerated burglary, arson, extortion and explosive offenses solely to make sure those offenses counted as predicate offenses, (BIO 12), reads the word "otherwise" completely out of the residual clause. App. A, Dissent at 7; *United States v. McCall*, 439 F.3d 967, 978 (8th Cir. 2006)(en banc)(Lay, J., dissenting). "Otherwise" clearly refers the residual clause back to the enumerated offenses. App. A, Dissent at 7. The government does not attempt to explain what purpose the word serves. Under its interpretation, "otherwise" serves no purpose. That result contravenes the well-established principle that every word of a statute should have a meaning if at all possible. *See Leocal*, 543 U.S. at 12.

The government's position also contradicts the legislative history of the ACCA and of the residual clause in particular. The government has no answer to the relevant House Report's reference to the residual clause as including crimes "similar" to the enumerated offenses. H. R. Rep. No. 99-849 , p. 3, quoted in *Taylor v. United States*, 495 U.S. 575, 587 (1990). Instead, the government cites to the *McCall* court's reliance on the fact the residual clause was initially the operative provision before the enumerated offenses were added. (BIO at 12 (quoting *McCall*, 439 F.3d at 971). But, as Judge McConnell explained, this history must be understood in a broader context.

> Congress was amending the 1984 version of the statute, which applied explicitly to robbery and burglary, and only to those crimes. These were not 'enumerated add-ons,' ... but were the statutory foundation on which the congressional deliberations

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> were based. The entire thrust of the 1986 debates was to expand the statute to encompass other crimes that warranted the same treatment already given robbery and burglary. The only question was how far to go.

(App., Dissent at 12). Congress chose to extend the definition of "violent felony" to include crimes "similar" to the enumerated offenses. H. R. Rep. No. 99-849, p. 3.

The government also fails to address the fact that its interpretation of the "otherwise" clause contradicts the purpose of the ACCA to "focus[] on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor*, 495 U.S. at 587-588. As Judge McConnell observed, (App. A, Dissent at 8-9),including drunk drivers as "armed career criminals" does not provide that "focus."

The government's position does not withstand scrutiny in light of the language and context of 18 U.S.C. § 924(e)(2)(B)(ii), cardinal principles of statutory construction, legislative history and the goals of the ACCA.

F. *The lack of a circuit conflict does not argue against granting certiorari.*

The lack of a circuit conflict on the question whether DWI is a "violent felony" under the ACCA, noted by the government, (BIO at12-13), does not impede the granting of certiorari in this case. First, the government exaggerates the extent of the agreement among the circuits by citing to the circuit courts' interpretation of "crime of violence" under USSG § 4B1.2(a)(2). (BIO at 13). All the judges of the Tenth Circuit agreed that interpretation does not govern the interpretation of "violent felony" under the ACCA, since the guideline commentary expands the

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coverage of the residual clause beyond the language of the ACCA's residual clause. (App. A at 11-12; App. A, Dissent at 3, n. 1). *See* USSG § 4B1.2, comment. (n.1).

Second, the issue Mr. Begay raises has provoked thoughtful dissents in *McCall* and this case. Third, the dissents have the better of the argument. Fourth, the government does not deny Mr. Begay's argument that he presents an important issue with dramatic consequences for many defendants. (PFC at 7-10). These reasons overcome any reluctance to decide an issue without a circuit conflict.

G. *More reasons exist for granting certiorari in this case than in Gwartney.*

Contrary to the government's argument, (BIO at 15-16), this Court's denial of certiorari in *Gwartney v. United States*, 127 S.Ct. 2097 (2007), in which the petitioner raised the same issue as Mr. Begay raises here, does not mean this Court should deny certiorari in this case. In *Gwartney*, before the Tenth Circuit, the defendant conceded the Tenth Circuit's prior decision that DWI was a "crime of violence" under § 4B1.2(a)(2) precluded his "violent felony" argument under the ACCA. *United States v. Gwartney*, 197 Fed.Appx. 746, 748 (10th Cir. Sept. 14, 2006)(unpub'd). As a consequence, the Tenth Circuit panel in that case reflexively denied relief without discussion in an unpublished decision. *Id.* By contrast, Mr. Begay vigorously challenged application of the ACCA. His advocacy provoked three thoughtful published opinions, including a dissent favoring Mr. Begay by Judge McConnell, "a well-respected federal judge," *see Rita v. United States*, 127 S.Ct. 2456, 2474 (2007)(Stevens, J., concurring). Because the arguments on both sides have been fully developed in this case, this case is more worthy than *Gwartney* of this Court's certiorari review.

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CONCLUSION

For the reasons stated above and in his petition for certiorari, petitioner Larry Begay requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489

Margaret A. Katze
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I, Michael A. Keefe, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Larry Begay, I personally mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, and to Assistant United States Attorney David N. Williams, P.O. Drawer 607, Albuquerque, NM 87103, this 15th day of August, 2007.

Michael A. Keefe
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489